No. 12668

IN THE

United States

Court of Appeals

For the Ninth Circuit

EDWARD HERZINGER, Appellant,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, a Corporation, and E. J. ODERMATT, Appellees.

Reply Brief of Appellant

Upon Appeal From the District Court of the United States For the District of Nevada

HON. ROGER T. FOLEY, District Judge

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REPLY BRIEF OF APPELLANT

In view of the fact that the brief of Standard Oil Company of California has raised the question of the applicability of the doctrine of res ipsa loquitur to this case, and also in view of the fact that appellant's position in several phases of this appeal has been misinterpreted by Standard Oil Company of California, appellant deems it advisable to submit this reply brief. The several matters will be discussed in substantially the order presented by the brief of Standard Oil Company of California.

SUMMARY OF ARGUMENT

I.

Appellant is entitled to assign as error the refusal of the Court to give plaintiff's requested Instruction No. 1 (Refused) and the inclusion by the Court in its "Explanation Requested by Jury of Instruction No. 22" of the portion objected to by appellant.

II.

The Court erred in refusing to give to the Jury plaintiff's Instruction No. 1 (Refused).

III.

This is a proper case for the application of the doctrine of res ipsa loquitur.

IV.

The portion of the "Explanation Requested by Jury of Instruction No. 22" objected to by appellant was, particularly under the circumstances, improper and confusing to the Jury.

V.

Nielson's testimony shows, as a matter of law, that he was negligent.

VI.

The expert witness Ryan's opinion was elicited either based upon his hearing and observation of the testimony already offered in the case, or based upon no facts whatsoever.

ARGUMENT

I.

Appellant is entitled to assign as error the refusal of the Court to give plaintiff's requested instruction No. 1 (Refused) and the inclusion by the court in its "Explanation Requested by Jury of Instruction No. 22" of the portion objected to by appellant.

Standard Oil Company of California contends

that since appellant failed to state specific grounds for his objections to the Court's refusal to give Plaintiff's Requested Instruction No. 1 (Refused) and to a portion of the "Explanation Requested by Jury of Instruction No. 22," that appellant is barred from assigning these as error on appeal.

Appellant admits that the record reveals only a general objection to the Court's refusal to instruct as appellant requested. What the record does not show is the extended and exhaustive oral discussion between the Court and all counsel with respect to all instructions given or refused by the Court. In the light of this fact the case cited by Standard Oil Company of California should be reviewed.

Palmer v. *Hoffman*, (1943) 318 U. S. 109, 63 S. Ct. 477, 483, states:

> "In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error."

With this rule we have no objection for in the present case both Court and counsel were fully informed as to the specific reasons for appellant requesting the questioned instruction, and the grounds for objecting when the Court refused it.

As the Court of Appeals for the Third Circuit has said on two occasions:

> "Rule 51 is designed to preclude counsel from assigning for error on appeal matter at trial

> which he did not fairly and timely call to the attention of the trial court." (*Stilwell* v. *Hertz Drivurself Stations*, (3 Cir. 1949) 174 F.2d 714, 715; *Alcaro v. Jean Jordeau, Inc.*, (3 *Cir.* 1943) 138 *F.2d* 767, 771.)

This same interpretation of the rule was given by the Sixth Circuit when it spoke of the purpose of the rule being: "to call the trial court's attention specifically to the parties' requests or objections." *Evansville Container Corp.* v. *McDonald*, (6 Cir. 1942) 132 F.2d 80, 84.

Standard Oil Company of California does not contend that it or the Court were unaware of the grounds for appellant's objections; it merely argues that the grounds are not in the record. Under very similar circumstances the Second Circuit has said:

> "The purpose of exceptions is to inform the trial judge of possible error so that he may have an opportunity to reconsider his rulings and, if necessary,correct them. See Rule 46, F.R.C.P.; 3 Moore's Federal Practice, p. 3090. Here it appears that there was full discussion of the point raised which adequately informed the court as to what the plaintiff contended was the law, and the entry of a formal exception after that would have been a mere technicality. Cf. *Stolz v. United States*, 9th Cir., 99 F.2d 283, 284. Those cases construing Rule No. 51, F.R. C.P. strictly all involve situations where no in-

> dication was given to the judge that error would be assigned to his ruling." *Sweeney v. United Feature Syn.* (2 Cir. 1942) 129 F.2d 904 and 905.

Appellant has satisfied the reason and meaning for the rule, and the assignments of error in this case are in keeping with the spirit of the rule as interpreted by the courts as cited above. His position is justified in the language of a general authority which summarizes the situation by saying:

> "But Rule 51 is not top-heavy with technical excuses for overlooking trial errors. After all only those errors are waived which might have been corrected had the proper objection or request been made. If the trial judge is fully informed of the specific grounds of objection or request, there is no need for repetition." 2 *Barron & Holtzoff—Federal Practice and Procedure p.* 801

In the instant case the Court, upon adjournment for the evening recess on Wednesday, February 15 at about 4:30 p. m., called counsel into chambers for the purpose of discussing the instructions. All counsel were present and the discussion continued until after 9:30 p. m. without interruption even for the purpose of eating. Each party submitted requested instructions and every proposed or requested instruction was discussed by the Court and counsel at great length and in detail.

Also, Plaintiff's Requested Instruction No. 1 (Refused), as submitted, cited as authority the case of

Montgomery Ward & Co. v. *Stevens*, (1941) 60 Nev. 358, 109 P.2d 895. This case and the principle of law contained in the requested instruction was presented to the Court during the lengthy argument on the motion to dismiss made by Standard Oil Company of California at the close of Plaintiff's case, the motion being upon the ground that the defendant Odermatt was not an agent of Standard Oil Company of California. This authority pointed up the specific position of appellant in requesting Plaintiff's Requested Instruction No. 1 (Refused).

In substance, the same is true of the general objection made to the inclusion in the "Explanation Requested by Jury of Instruction No. 22" of the portion objected to by appellant. When the Court received the note from the foreman of the jury, after the jury had deliberated some ten hours, the Court called counsel for each of the parties to chambers and a full and complete discussion was had concerning all parts of the explanation to be given by the Court. Both Court and counsel were fully informed of the basis for the objection.

The Court was not misled by the fact that appellant made only general objections and it is a perversion of fact to indicate that it was.

II.

The court erred in refusing to give to the jury plaintiff's Instruction No. 1 (Refused).

Standard Oil Company of California, beginning at page 6 of its brief, contends that the requested in-

struction was properly refused because the evidence does not show either representations by Standard Oil Company or reliance thereon by appellant.

The relationship between the parties arose when appellant purchased the Mineral Hot Springs property and as a part of the purchase took an assignment of a dealer agreement between Standard Oil Company of California and one O. J. McVey (R. Vol. I, pp. 259, 262, Plaintiff's Exhibit 10). Under this agreement the petroleum products to be handled by appellant at Mineral Hot Springs were to be only those of Standard Oil Company of California. The details of delivery of the petroleum products to Mineral Hot Springs are not contained in the agreement. The defendant Odermatt in one capacity or another had been delivering petroleum products in the area of Mineral Hot Springs from the bulk plant at Wells, Nevada, since about 1932 (R. Vol. I, p. 78). It is certainly safe to assume that appellant was aware of the source of supply of the petroleum products to be handled by him at Mineral Hot Springs. Standard Oil Company of California saw fit to transact all of its business with appellant through the defendant Odermatt. Plaintiff's Exhibits 1, 2, 3 and 4, when described as being typical of the method of transacting business disclose, that not only were the petroleum products of Standard Oil Company of California delivered to Mineral Hot Springs by Odermatt, but also Odermatt gave appellant credit for petroleum products sold on Standard Oil Company of California credit cards, received

payment for petroleum products of the Company (R. Vol. I, p. 56), and received rentals under a lease of the premises between appellant and the Company (R. Vol. I, p. 61).

It is difficult to visualize a situation in which a Company in the position of Standard Oil Company of California could do more to represent to one of its dealer accounts that a certain individual was the agent of the Company. The only logical impression which appellant could receive from the fact that all of his dealing with Standard Oil Company of California were handled by Odermatt and on forms furnished by and showing the name of the Company (Pl. Exhibits 1, 2 and 4), was that Odermatt was the agent of Standard Oil Company of California.

As for reliance upon the representations, what more reliance could there be than the continued performance by appellant under the dealer agreement and the continued permitting of Odermatt or an assistant to deliver highly volatile petroleum products upon the premises of appellant? On these premises there were located valuable improvements which, as was amply demonstrated, could be readily destroyed by fire resulting from improper handling of such petroleum products.

We are not impressed by the contention of Standard Oil Company of California that the record affirmatively shows knowledge by appellant that Odermatt was not the servant or agent of Standard Oil Company of California. The basis for this con-

tention is apparently that appellant was to learn something regarding the status of Odermatt from an examination of appellant's dealer agreement with Standard Oil Company of California. Such a result does not follow. Also, it would not seem significant that the name of Standard Oil Company of California did not appear on the truck or that the door of the truck was painted with the words "E. J. Odermatt, Wholesale Distributor, Wells, Nev."

III.

This is a proper case for the application of the doctrine of res ipsa loquitur.

Standard Oil Company of California contends that appellant's objection to the inclusion by the Court in its "Explanation Requested by Jury of Instruction No. 22" of the portion objected to by appellant is without merit, first because appellant received the benefit of the doctrine of res ipsa loquitur to which he was not entitled.

The application of the doctrine of res ipsa loquitur was argued fully to the Court upon the motion to dismiss made at the close of the plaintiff's case and the Court concluded properly that this was a proper case for the application of the doctrine.

The cases cited by Standard Oil Company of California contain language to the effect that the doctrine of res ipsa loquitur cannot be applied where all the possible causes of the accident are not under the control of the defendant. Similar language is

contained in many cases discussing the doctrine. However a review of the authorities will disclose that the doctrine of res ipsa loquitur has not been limited or fixed to such an extent.

Recently the Court of Appeals for the First Circuit reversed a case on the ground that it was improper for a jury to draw an inference of defendant's negligence from an accident which included activities of the injured person, even though the jury, under proper instructions, could find from the evidence that the injured person's activities did not cause the injury. The United States Supreme Court thought this point was of sufficient importance to grant certiorari, to amend this rule, and to reverse the Court of Appeals. *Jesionowski* v. *Boston & M. Ry.*, (1947) 329 U. S. 452, 91 L. Ed. 355, 67 S. Ct. 401, 169 A.L.R. 947. Justice Black delivered the opinion and attacked the erroneous concept of res ipsa loquitur which holds that the rule has rigidly defined prerequisites, one of which is that to apply it, the defendant must have exclusive control of all the things used in the operation which might probably have caused the injury. He said:

> "Res ipsa loquitur, thus applied, would bar juries from drawing an inference of negligence on account of unusual accidents in all operations where the injured person had himself participated in the operations, even though it was proved that his operations of the things under his control did not cause the accident." 169 A.L.R. 947, 951.

He cites *Sweeney* v. *Erving*, 228 U. S. 223, 240, 57 L. Ed. 815, 33 S. Ct. 416, as sound authority for his view that it is not a question whether the application of the rule fits squarely into some judicial definition, rigidly construed, but whether the circumstances were such as to justify an inference of defendant's negligence. Thus, in the two cases in which the U. S. Supreme Court considered this very issue, it has strongly stated its preference for a realistic and liberalized view of the rule. For, as Justice Black said, it would "run counter to common everyday experience" to say that, after a finding by the jury that none of the possible causes of the accident under the control of the injured person did in fact cause the accident, that the jury is without authority to infer that defendant was negligent with respect to possible causes of the accident under his exclusive control.

It is apparent that appellees could not have been injured or prejudiced by the application of the doctrine under these circumstances because the jury had been instructed to consider the possible negligence of the appellant before it turned to an inference of negligence on the part of the appellee.

Standard Oil Company of California cites several cases supporting the restrictive interpretation of the doctrine of res ipsa loquitur. All of these cases can be distinguished on their facts, and at least one, *Weaver* v. *Shell Co.*, (1936) 13 Cal.App.2d 643, 57 P.2d 571, turns partially on the less favorably regarded premise that the doctrine can be ap-

plied only when the facts of the accident are more accessible to defendant than to plaintiff. But regardless of these distinctions, appellant admits that within the large body of cases discussing the doctrine, there are those which adhere to the stringent and narrow rule so severely criticised by the Supreme Court. The doctrine, through its manifold use by the courts, has tended to become formalized and unrealistic and not responsive to the need for which it was created. The better reasoning is contained in the language of the Supreme Court quoted above and in many decisions which have recognized the proper application of the doctrine with a view toward its purpose rather than the ability to fit the facts into narrowly defined stringent rules and definitions. *Lynch* v. *Meyersdale Electric Light, H. & P. Co.*, (1920) 268 Pa. 337, 112 A. 58; *Gordon* v. *Aztex Brewing Co.*, (1949) 90 Cal. 2d 514 203 P. 2d 522; *Las Vegas Hospital Ass'n, Inc., et al.* v *Gaffney*, (1947) 64 Nev. 225, 180 P.2d 594.

IV.

The portion of the "Explanation Requested by Jury of Instruction No. 22" objected to by appellant, was, particularly under the circumstances, improper and confusing to the jury.

Standard Oil Company of California next takes the position that the portion of the Court's Explanation Requested by Jury of Instruction No. 22 to which appellant objected was proper and therefore appellant's objection is invalid.

The circumtances under which the Court's Explanation was given to the jury should certainly be considered in determining whether or not the explanation and particlarly the portion thereof objected to by appellant was proper.

The jury obviously had found that none of the instrumentalities under plaintiff's control were the cause of the fire, otherwise it would not have been concerned, as its note shows it was (R. Vol. I, p. 23), with the existence of the inference and the question of which party had the duty to explain the cause of the fire. Under those circumstances and knowing the particular question in the minds of the jurors, the Court, in effect, gave instruction No. 22 to the Jury again but inserted in it the words "Plaintiff's burden of proving negligence and the proximate cause of the fire by a preponderance of the evidence is not changed by the rule just mentioned." The inclusion of these words had the effect of again giving instruction No. 21. At this point, in view of the obvious determination by the jury that none of the instrumentalities under the control of the plaintiff had caused the fire, there could not help but be confusion in the minds of the jurors.

The case is different from the majority, in that the Court did not give all of its instructions to the jury at one time, but gave its "Explanation Requested by Jury of Instruction No. 22" after the jury had deliberated some ten hours and after receiving a note from the foreman which made the

particular concern of the jury known to the Court. It is appellant's position that under these circumstances the inclusion of the words objected to by appellant in the Court's explanation nullified the doctrine of res ipsa loquitur, to the benefits of which appellant was entitled.

That the jury was confused by Instructions No. 21 and 22 is apparent, the Court's explanation given to the jury in the early hours of the morning merely added to this confusioon.

V.

Nielson's testimony shows, as a matter of law, that he was negligent.

Appellant cannot agree with Standard Oil Company of California's conclusion that the testimony of Nielson, the driver of the truck, shows that he did exercise reasonable care under the circumstances while delivering the gasoline, and this is true even though his testimony be entirely accepted as true.

Several items of negligence on the part of Nielson are set forth on pages 26 and 27 of appellant's brief. If there were no other factors of negligence involved, the fact that Nielson laid the hose on the ground with the nozzle of the hose in the filler pipe while he went inside the building would certainly be sufficient to show that his actions were not those of a person exercising reasonable care.

It is certainly seriously contended that Nielson

had a duty to determine that there were no sources of ignition present during the delivery of gasoline. That this was an accepted safety rule was shown by the testimony of Standard Oil Company of California's own expert witness Ryan (R. Vol. II, p. 520). Standard Oil Company of California is bound by the testimony of this witness and cannot now be heard in its attempt to impeach its own witness.

Likewise, appellant cannot agree that a logical cause of the fire was shown as set forth on page 24 of Standard Oil Company of California's brief. This is particularly true in view of the emphasis placed upon the kerosene refrigerator. The only affirmative evidence in the record relating to the question of whether or not this kerosene refrigerator was in operation at the time of the fire is the testimony of Mr. Mosely (R. Vol. 1, p. 113) and of the completely disinterested Mrs. McLean (R. Vol. 1, p. 248). Both of these witnesses testified positively that it was not in operation and had not been for several months. Defendants produced no witnesses to rebut this testimony. An attempt is made to infer that this kerosene refrigerator was in operation at the time of the fire from the fact that after this prolonged and intense fire remains of cooked meats were found in the refrigerator. Mr. Mosely (R. Vol. I, p. 160) explained that the remains were of *cured* meats which had been stored in the non-operating refrigerator. This explanation is not denied or rebutted.

Standard Oil Company of California (Br. 24) states that whether this refrigerator was in opera-

tion at the time of the fire or whether it was not is a matter of conflicting evidence. There is no conflict in the evidence—the uncontradicted evidence is that the kerosene refrigerator was not operating. There is no evidence upon which the jury could have found that it was.

As to other appliances causing the fire, all of these appliances were located within the building. The witness Ryan testified (R. Vol. II, p. 518) that any such fire would have to start at the point of ignition and would thereafter tend to follow the vapor trail back to the source of the vapor. That the fire did not start within the building is agreed upon by all of the witnesses present. The witness Mosely testified (R. Vol. I, p. 103) that he saw the fire "right under the truck." The witness Klitz testified (R. Vol. 1, p. 199) that the fire when he looked up was in front of the building, that there was no fire in the panorama machine and no fire in the grocery store. The witness Nielson testified (R. Vol. II, p. 421) "I turned around and noticed the flash of fire next to the window *outside.*"

The evidence produced by the defendants does not explain the fire and does show that the acts of Nielson were not those of a person exercising ordinary care. Under the authority of the cases cited in appellant's brief, (pp. 28 through 30), it should be held that the defendants failed to sustain the burden of showing that due care was exercised.

VI.

The expert witness Ryan's opinion was elicited either based upon his hearing and observation of the testimony already offered in the case, or based upon no facts whatsoever.

Beginning at the bottom of page 25 of the brief of Standard Oil Company of California, the propriety of the Court's ruling challenged by point IV of appellant's Specification of Errors is discussed. Nowhere in this discussion is there any dispute with the authorities cited by appellant in support of this point (appellant's Br. pp. 34-39). Instead, Standard Oil Company of California offers several contentions which it claims warranted the trial court in permitting the witness Ryan to testify as shown on pages 522 and 523 of Volume II of the Record.

The first contention is that the assumption made by appellant that the witness was asked his opinion based upon "hearing and observation of the testimony already offered in the case" is incorrect, and that the objectionable question was merely one of a series of at least six questions asked of the witness relating to possible causes of fire.

It is believed that a complete analysis of the testimony of the witness Ryan will reveal the error in this contention of Standard Oil Company of California.

In the first place, the testimony contained in Point IV of appellant's Specification of Errors is improperly analyzed by Standard Oil Company of

California. The witness Ryan (R. Vol. II, pp. 522, 523) was first asked:

> "Mr. Ryan, the cross-examination has suggested another question on redirect examination. From your hearing and observation of the testimony already offered in this case, is it your opinion that there was any outside agency at the time of the fire at or near the truck which caused the fire?"

This was objected to as

> "not a proper hypothetical question by reference and not proper redirect * * *"

The Court then overruled the objection and directed the witness to answer the question. The witness then began his answer,

> "I saw no evidence indicating there was a source of ignition which the operator of the truck—"

This answer was objected to as

> "invading the province of the jury."

The Court then stated,

> "It is not responsive. Read the question."

After the question was read, the objection to the *answer* was renewed. The Court then sustained the objection. Properly analyzed the situation at this point was in substance that the Court had overruled an objection to the question based upon the witness'

hearing and observation of the testimony but had sustained an objection to the answer commenced by the witness, the Court apparently being of the opinion that the answer was not responsive to the question. At best, it is obvious that the exact situation at this point in the testimony was somewhat confusing, particularly would this be true insofar as the jury was concerned.

The witness was then asked,

> "As a matter of opinion, Mr. Ryan, could any fire have emanated in or about the truck without some outside agency, light or fire?"

This was objected to, the objection overruled, (the Court being consistent with its ruling on the previous *question*) and the witness permitted to answer,

> "I can see no such possibility."

Obviously the witness was asked for an opinion based upon something. The important consideration is what did the jury understand to be the basis of the called for opinion. The only possible impression which the jury or anyone reading the record could receive is that the witness was being asked for his opinion based upon his "hearing and observation of the testimony already offered." This naturally follows since it was the basis outlined in the question immediately preceding and no other basis for the opinion is stated in the objectionable question.

If the witness' opinion was not called for upon his hearing and observation of the testimony already

offered, *then his opinion was elicited upon the basis of no facts whatsoever.* If the latter is the situation, then the objection to the question should certainly have been sustained in view of the unquestioned general rule relating to the fundamentals of proper examination of expert witnesses, which rule and the reasons therefor are set forth on page 34 and 35 of appellant's brief.

Even if it be assumed that the Court did sustain an objection to the first question quoted above, it certainly cannot be successfully argued that the question the witness was permitted to answer was but one of a series of questions. The witness was called to testify during the afternoon session on Wednesday, February 15, direct examination of the witness was completed and his cross-examination had begun when the evening recess was taken. On the morn- of Thursday, February 16, the cross-examination was completed, and it was on re-direct examination that the objectionable question was asked. All of the other questions which Standard Oil Company of California suggests as composing the so-called series of questions were asked on the previous day and prior to cross-examination. There is absolutely nothing in the question or remarks of counsel to in any way justify the suggestions that the objectionable question was one of a series or that the objectionable question was based upon the hypothetical facts assumed in questions asked the previous day.

The first two questions included within Standard Oil Company of California's "series of at least six

questions," namely, those relating to spontaneous combustion and an open flame, were general questions not relating to or directed to the fire involved in this action. The hypothetical questions related to the particular circumstances involved in the action. It should be noted that in asking these hypothetical questions, counsel was very careful to inform the witness, the Court and the jury that the questions were hypothetical questions and were being asked upon assumed facts. "*I want to ask you now, Mr. Ryan, a so-called hypothetical question based, I hope, upon the evidence introduced in this case. Let us assume * * **" (R. Vol. II, p. 503). "*Let me amplify that question by this statement: There has been some variation in the evidence with respect to heat, but assuming, Mr. Ryan, that the heat on that day was * * **" (R. Vol. II, p. 505). "*Let me ask you this further hypothetical question. Assuming in this case that the truck in question * * **" (p. 507). "*Let me ask you this brief hypothetical question. Assume that the canopy we have just referred to * * **" (p. 509). "*Well, here is another hypothetical question, * * * Assume there is a hot water heater * * **" (p. 511). "*Well, assuming, as I understand Mr. Herzinger to testify, * * **" (p. 511). "*Well, assuming that at the time of this fire it was a still day * * **" (p. 512).

It seems quite clear from the quotations above that counsel, when asking a question based upon hypothetical or assumed facts, was extremely careful to frame his questions so as to make the premise clear,

and it is likewise apparent that the objectionable question was not asked upon any hypothetical set of facts but upon the witness' "hearing and observations of the testimony already offered."

It is certainly not proper to assume that the question was cumulative and by way of summary of previous questions or that it was merely repetition. The question was asked with a purpose and that purpose was to elicit from the witness his answer to the fundamental issue in the case based upon not assumed facts made know to the Court and the jury, but upon the witness' hearing and observation of the testimony.

Standard Oil Company of California attempts to justify the Court's ruling upon the grounds that the witness had previously testified in substantially the same manner (Br. 28). This contention is likewise without merit when it is remembered that the testimony of the witness quoted on page 28 of Standard Oil Company of California's brief related not to the particular fire involved but to fires generally. The objectionable question and answer did not relate to gasoline vapor fires generally, but to the particular fire involved in this action and to the particular truck involved in this action. From the standpoint of prejudice to appellant, the difference between the two is at once apparent. In the one case, the witness was permitted without objection to testify that it was necessary for there to be some agency outside of the gasoline and the gasoline vapors which

would be necessary to cause a fire. *The objectionable question elicited an answer which in essence eliminated the truck and anything about it as a cause of this particular fire.* Standard Oil Company of California attempts to belittle this elimination (Br. 28), by saying that the witness had already testified in answer to a hypothetical question that the exhaust pipe of the truck would not ignite the gasoline vapors and that the evidence was that the truck's motor was not running. It is true that Nielson testified the motor was not running, but the jury is not bound to accept such testimony as true. Also, there is at least one other possible cause of the fire in which the truck would be a participating agent and that is static electricity (R. Vol. II, p. 514).

Standard Oil Company of California (Br. 28) states that "The jury unquestionably understood the nature of the question and the hypothetical facts upon which it and the preceding questions answered by the witness were based. They were entitled to the benefit of the expert witness' opinion on the subject." The jury was entitled to the benefit of the witness' opinion based upon facts which were made known to the jury through the medium of the question itself. It would have been a very easy thing for counsel to have done as he did with other questions and make reference to the previous questions and let the witness and the jury know what facts were being assumed by the witness when his opinion was formed. Obviously Standard Oil Company of California cannot know what the jury understood. It is

to avoid any confusion in the minds of the jury as to the facts upon which the opinion is based that the rule has been evolved as set forth in appellant's brief.

At the top of page 29 of its brief, Standard Oil Company of California appears to contend that the burden under such circumstances is upon the cross-examiner to elicit from the witness the facts upon which the witness' opinion is based. The two cases cited for this proposition are authority merely for the proposition that wide latitude should be allowed in cross examination of an expert witness. There is nothing in either of the cases to indicate that the cross-examiner should be required to give to the Court and the jury the facts upon which the witness has been permitted to express his opinion on direct examination. This is the duty of the examiner on direct and not of the cross-examiner, and this is particularly true in view of the objection made which called distinct attention to the fact that such an expert was to be examined by hypothetical questions and that the question asked did not contain any facts upon which the witness could form or express his opinion.

Standard Oil Company of California misconstrues appellant's position with reference to the mention in appellant's brief of the fact that the witness Ryan was permitted to give an opinion upon the fundamental and basic question in the case. The appellant does not quarrel with the cases cited near the bottom

of page 29 of Standard Oil Company of California's brief insofar as they state that it is proper for an expert witness to give an opinion concerning the fundamental issue of a case. The fact that the witness Ryan was permitted to give a "positive and unqualified opinion on the fundamental and basic question in the entire case" was mentioned in appellant's brief for the purpose of showing particular prejudice to the appellant, since the improper question related to such an important phase of the case.

Standard Oil Company of California also contends that there could be no prejudice to appellant in view of the Court's instruction regarding expert testimony. (Br. 29). The instruction appears to be a standard instruction regarding expert testimony and gives the jury the right to determine the weight to be given to the testimony. This is fundamentally no different than the right which the jury has as to all testimony. The instruction itself states that opinion testimony of an expert is an exception to the general rule of evidence regarding opinions. Since it is an exception to the general rule, it cannot be overemphasized that the Courts have a positive duty to see that the opinions of expert witnesses are received only in response to properly framed questions and acceptable procedure.

The witness Ryan is no doubt a loyal employee of

Standard Oil Company of California, or at least one of its wholly owned subsidiaries. This can safely be assumed in view of his long continuous employment. Being human and subject to the frailties common to all humans, this witness particularly should not have been permitted to sift the evidence, accept and reject what he, and not the jury, saw fit to accept or reject and to base his opinion upon this fundamental question upon his own, and not the jury's, impression of the evidence. When such a witness is asked his opinion, there should be no question in the minds of the jury as to the basis of his opinion. Whether the positive opinion of the witness, "I can see no such possibility" was based upon the witness' hearing and observation of the testimony already offered or upon some unknown details of his long association with Standard Oil Company of California, it should not have been permitted. The factual basis of the opinion should have been made perfectly clear to the Court and to the jury.

To permit this witness, the only expert who testified at the trial and who was held out to the jury as being exceptionally well qualified, to express his opinion upon this fundamental issue in response to a question which called for his opinion based either upon his hearing and observation of the testimony already offered or upon no facts whatsoever was highly prejudicial and clearly reversible error.

CONCLUSION

Appellant submits that the plaintiff's motion for new trial should have geen granted and that the judgment and order appealed from should be reversed and the cause remanded for a new trial.

Respectfully submitted,

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